has made provision concerning an alien's wife or minor child suffering from contagious disease, when such alien has made a declaration of his intention to become a citizen, and when such disease was contracted on board the ship in which they came, holding them under regulations of the secretary of the treasury until it shall be determined whether the disorder will be easily curable, or whether such wife or child can be permitted to land without danger to other persons, requiring that they shall not be deported until such facts are ascertained (37 Stat. 1221, U. S. Comp. Stat. 1901, Supp. of 1903, p. 185). But congress has not said that an alien child who has never dwelt in the United States, coming to join a naturalized parent, may land when afflicted with a dangerous contagious disease.

As this subject is entirely within congressional control, the matter must rest there; it is only for the courts to apply the law as they find it.

It is suggested that the agreed finding of facts contains no stipulation as to the dangerous or contagious quality of trachoma, but the petition shows that the petitioner's daughter was debarred from landing because it was found that she had a dangerous contagious disease, to wit, trachoma. Furthermore, the statute makes the finding of the board of inquiry final, so far as review by the courts is concerned, the only appeal being to certain officers of the department. (32 Stat. 1213; Nishimura Ekiu v. United States, 142 U. S. 651.)

Finding no error in the order of circuit court, it is affirmed.

HIGH COURT OF JUSTICIARY OF SCOTLAND. (FULL BENCH)

(The Lord Justice-General, The Lord Justice-Clerk, Lords M'Laren, Kyllachy, Stormonth-Darling, Low, Pearson, Ardwall, Dundas, Johnston, Salvesen, and Mackenzie.)

MORTENSEN V. PETERS

Justiciary Cases—Jurisdiction—Herring Fishery Laws—Foreigners Fishing Within Prohibited Area—Sea Fisheries (Scotland) Amendment Act, 1885 (48, 49 Vict. C. 70), §7— Herring Fishery (Scotland) Act, 1889 (52 & 53 Vict. C.23), §7 (1)—Herring Fishery (Scotland) Act. Amendment Act, 1890 (53 & 54 Vict. C. 10)—Sea Fisheries Regulation (Scotland) Act, 1895 (58 & 59 Vict. C. 42), §10 (4).

Stated Case

This was an appeal against a conviction obtained against the appellant in the sheriff court at Dornoch on a complaint which charged:

That Emmanuel Mortensen, residing at 24 Montague street, Grimsby, has been guilty of a contravention of the sea fisheries acts and the herring fisheries (Scotland) acts, in so far as on thirtieth November, 1905, he, being the master of the Norwegian steam trawler *Niobe*, S. D. 5, of Sandefiord, Norway, did, contrary to the bye-laws and sections of the statutes after mentioned, use the method of fishing known as otter trawling in a part of the Moray Firth five miles or thereby east by north from Lossiemouth, which lies within a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire, and is within the area specified in the bye-law No. 10 made by the fishery board for Scotland, under the powers conferred by the sea fisheries (Scotland) amendment act, 1885, the herring fishery (Scotland) act, 1889 (particularly §7 (1) thereof), and the herring fishery (Scotland) act amendment act, 1890, dated said bye-law at Edinburgh on twenty-seventh September, 1892, confirmed by her late majesty's secretary for Scotland on twenty-second November, 1892, and published in the Edinburgh Gazette on twenty-fifth November, 1892, as amended by bye-law No. 14, made by the said fishery board under the powers conferred by the herring fishery (Scotland) act, 1889, §7 (1), dated said bye-law at Edinburgh on seventeenth April, 1896 ,confirmed by her late majesty's secretary for Scotland on sixth August, 1896, and published in the Edinburgh Gazette on eighteenth August, 1896, a copy of which bye-laws, certified by the secretary of said fishery board, is produced herewith, whereby the said Emmanuel Mortensen is, on conviction, liable in terms of the sea fisheries regulation (Scotland) act, 1895, §10 (particularly sub-section 4 thereof), to a fine not exceeding £100, and failing immediate payment of the fine, to imprisonment for a period not exceeding sixty days, without prejudice to diligence by poinding or arrestment, if no imprisonment has followed on the conviction; and further, to forfeiture to every net set or attempted to be set by him at the time and place libeled, in contravention of the bye-laws above mentioned. That by virtue of the powers conferred by §7, of the sea fisheries (Scotland) act amendment act, 1885, the said fishery board have declared that the sheriff court at Dornoch is the most convenient court for the trial of the charge above libeled, conform to notice under the hand of the secretary to said board, dated fifth January, 1906, herewith produced.

At the trial the appellant stated as a preliminary objection that said steam trawler being registered in Norway and the locus of the offense being as alleged, the appellant was not subject to the jurisdiction of Dornoch sheriff court. Under reservation of the said objection, the appellant pleaded not guilty.

It was proved that said steam trawler was registered in Sandefiord, Norway, and that the appellant was a Dane.

It was further proved that the appellant did on thirtieth November, 1905, being the master of said steam trawler, use the method of fishing known as otter trawling in a part of the Moray Firth five miles or thereby east by north from Lossiemouth, which lies within a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire; and there was produced and proved an admiralty chart, having marked thereon the foresaid position of said steam trawler, which position was

outwith a line drawn at a distance of one marine league from low-water mark on the adjacent coast, and within ten miles of the coast.

There were produced by witnesess for the prosecution the following documents, which were duly proved, viz: (1) A certificate by the secretary of the fishery board, dated fifth January, 1906, declaring the sheriff court at Dornoch to be the most convenient for the trial of the appellant; (2) a print of bye-laws made by the fishery board, including said bye-laws Nos. 10 and 14; (3) a copy of the Edinburgh Gazette of twenty-fifth November, 1892, containing said bye-law No. 10 as confirmed by her late majesty's secretary for Scotland; (4) a copy of the Edinburgh Gazette of eighteenth August, 1896, containing said bye-law No. 14 as confirmed by her late majesty's secretary for Scotland; and (5) a report, dated fourth December, 1905, by W. H. Lampard, an officer of his majesty's customs at Grimsby, giving the names, ratings, nationality and addresses of the crew of said steam trawler.

The sheriff repelled the appellant's said preliminary objection, found the appellant guilty of the contravention charged, fined him in the sum of £50 of modified penalty, and in default of immediate payment thereof decerned him to be imprisoned for the space of fifteen days. The appellant paid the fine.

The questions of law, submitted for the opinion of the high court of justiciary were:

1. Whether, in view of the facts stated as proved, and having regard to the bye-laws and the enactments of the sections of the statutes above mentioned, the appellant was subject to the jurisdiction of Dornoch sheriff court?

2. Whether, having regard to the provisions of the sea fisheries regulation (Scotland) act, 1895, and in particular to the provisions of §10, sub-sections 4 and 6 thereof, the conviction and sentence imposed on the appellant are legal and competent?

Argued for appellant: 1. The statutes and bye-laws on which this prosecution is founded are municipal statutes and bye-laws and, therefore, only confer jurisdiction over (1) British subjects, and (2) foreign subjects within British territory. There is no reservation in the statutes of the rights of foreigners, but the words "any person" mean "any person over whom the courts have jurisdiction." Our legislation is primarily territorial. It can at least in no case apply to foreigners outside British territory. (Maxwell on the Interpretation of Statutes, 4th ed., pp. 218, 226, 411.) Of course, if there is in a statute an express application to foreigners, the courts would enforce it, and the pleas of no jurisdiction would be of no avail. (The *Zollverein*, 1856, Swa. 96, per Dr. Lushing-

ton at 98; Story on the Conflict of Laws, 8th ed., §7; *in re* A. B. & Co. [1900], 1 Q. B. 541, per Lindley, M. R., 544.) Parliament is to be presumed to legislate so as not to do anything contrary to international law. (Rose v. Hineley, 1808, 2 Curtis (U. S.), 87, per Marshall, C. J., at 95–6; Hardcastle on Statutory Law, 3d ed., p. 413; Hall's Foreign Jurisdiction of the British Crown (1894) pp. 242, 246; The Queen v. Keyn (*Franconia* case) [1876], L. R., 2 Ex. D. 63). The decision in the *Franconia* case is still law, except so far as altered by the territorial waters jurisdiction act (1878, 41 and 42 Vict. c. 73), *i.e.*, at common law there is no jurisdiction below low-water mark; unless in Scotland according to the decisions it extends to the three-mile limit. (*Franconia* case, per Cockburn, C. J., at p. 210.) [The lord justice general referred to the argument in the *Franconia* case to show that the protection of fisheries may be in the same position as revenue, and that the courts may have jurisdiction over foreigners without the three-mile limit for this purpose.] Fisheries are not in an exceptional position. What Cockburn, C. J., refers to, is something of the nature of preventive jurisdiction ancillary to an exclusive right in territorial waters. (Wheaton's Int. Law, 4th ed., p. 279.) The right of regulating fisheries is based on no law, and has no history. It is not a right of any nation in waters not territorial. (Ortolan's Diplomatique de la Mer, pp. 145, 153.) Counsel referred to Cope v. Doherty [1858], 4 K. and J., 367, 2 DeG. and J., 416; Niboyet v. Niboyet, 1878, 4 P. D., 1, per Brett, L. J., at 19–20; The *Annapolis*, 1861, Lush. 295 at 306; Wharton's International Law Digest, ch. I. §9; Poll v. Lord Advocate 1899, 1 F. 823. The propositions put forward in state papers are the best evidence obtainable of international law at the time. In the Behring Sea arbitration (1893) the United States case referred to this legislation with reference to herring fisheries as an example of legislating for foreigners outside the territory. The British case (p.51) repudiated that construction of the statutes. In the matter of fishings the government will not claim to legislate so as to cover foreigners. It is unlikely that parliament would violate what the country's representatives so put forward as international law.

2 The appellant was not within British territorial waters when he is alleged to have contravened the bye-law, and it is admitted that he is not a British subject. International law is part of the common law which the courts administer. (West Rand Central Gold Mining Co. v. The King [1905], 2 K. B. 391, per Lord Alverstone, C. J., at 405–6.) There are persons to whom the statute would not be applicable, *e. g.*, the sovereign or a foreign ambassador, so that it is not universally applicable. (Triquet v. Bath, 1764, 3 Bur. 1478, per Lord Mansfield; Heathfield v. Chil-

ton, 1767, 4 Bur. 2106, per Lord Mansfield.) By international law territorial jurisdiction ends at the three-mile limit, with the exception of bays *intra fauces terræ*. (Lord Advocate v. Clyde Navigation Trs. 1891, 19 R. 174.) The three-mile limit and this single extension are well established. There is no case when a bay eighty miles wide has been held to be *intra fauces terræ*. So far as any width is laid down as a limit the maximum is ten miles. *Fauces* refers to something narrow. (Lewis and Short's Dictionary.) The idea is that of a land-locked bay. (The *Twee Gebroeders*, 1801, 3 Chas. Rob. 336; Vattel's Droit des Gens, §291.) The bays included are such as can be defended from the shore. (Stair, II, i, 5; Moore on the Foreshore, p. 376, quoting Hale's De Jure Maris; Westlake's International Law, p. 187; Nys' Le Droit International, vol. i, p. 446.) The Moray Firth does not satisfy the requirements of any of the writers as to *intra fauces terræ*. Acquiescence in a place being regarded as territorial may make it so. (Direct U. S. Cable Co., Ltd. v. Anglo-American Telegraph Co., Ltd., 1877, 2 A. C. 394, per Lord Blackburn at 417, 419, 420; The Queen v. Cunningham, 1859, Bell's C.C.R. 72; Westlake's International Law, p.185.) But there is no such claim put forward here. In the North Sea convention the North Sea is defined so as to include the Moray Firth, and the convention admits that the waters therein dealt with are outside territorial limits. Norway is not a party to the convention, but if the appellant was a Frenchman, and he said he stood on his rights under the convention, the courts would not construe the statute so as to make it a variance with the convention. The court, therefore, cannot construe it differently according to the nationality of the accused. In Peters v. Olsen, 1905, 7 F. J. 86, the trawler was caught within a ten-mile limit defined by the convention. It was under a different bye-law, and has no bearing on this case. Any opinions affecting this case were *obiter*. It is not the law of Scotland that all waters within a line drawn from headland to headland are territorial. All that Stair says is, that bays, etc., are capable of being declared territorial. The doctrine of the king's chambers, which is the doctrine of Halleck, has been quite discredited, and is maintained by no other writer. In both the Conception Bay Case and the Bristol Channel Case, the court proceeded on a mixed view, partly of configuration and partly of history.

Argued for the respondent: 1. The statute authorizing the bye-law is clear and unambiguous in its terms, and applicable to British subjects and foreigners alike. It is not disputed that so far as municipal laws are concerned, foreigners outside British territory are, *prima facie*, excluded. But the criterion is: What mischief was the legislation aimed at remedying? Was the object of the statute to give foreigners a monopoly

of the fishing in the area? Or was it to safeguard the interests of the line fishermen and prevent destruction of the spawn? The object was for the benefit of foreigners as well as British subjects. (Wilson v. McKenzie, 1894, 23 R. J. 56; The Queen v. Stewart [1899], 1 Q. B. 964.) The words of the act are in terms of universal application. When legislation applies to an area specified and defined there is no presumption that foreigners are excluded. (The Queen v. Keyn, cit. per Cockburn, C. J., at 160.)

If the territory to which it applies is undoubtedly British, the presumption is equally strong if the territoriality is doubtful. It is only where the territory is undoubtedly not British that there is a presumption that only British subjects are included. The limits of the North Sea, as given in the convention, were only for the purposes of the convention, and these have nothing to do with the purposes of the herring fishery act of 1889. 2. The Moray Firth is part of the British territorial waters. What constitutes territorial waters is all within a line drawn from headland to headland. The only objection to the application of that rule here is that there is a very great amount of water included. But that is not a valid objection. (Halleck's International Law, vol. i, p. 165; Westlake's International Law, pp. 187, 188.) The only limitation on that assertion of right is that no more is to be claimed than is reasonably necessary for the protection of the country's interests. (Hansard, 3d series, vol. ccxxxvii, col. 1607, per Lord Cairns.) The *Franconia* Case was decided on a misapprehension. (Orr Ewing's Trs. v. Orr Ewing, 1885, 13 R. H. L. I, at p. 12; Bell's Pr., §639; Stair, II, i, 5; Ersk. II. i. 6.) In the schedule to the act there are other spaces of water included which would be outside territorial limit according to the appellants' contention. The question is one of fact, viz: are there headlands, is the area well defined, and is it bounded by the coasts of the country? If a bay twenty miles wide may be territorial, so may one eighty miles wide. (Direct United States Cable Co. v. Anglo-American Telegraph Co. cit. per Lord Blackburn, 421; The *Alleganean*, 32 Albany Law Journal, 484; 4 Moore's International Arbitration, p. 4333; Hall's International Law, p. 157.) There are no promontories or *fauces* in the Moray Firth other than those taken here. 3. Even if the Moray Firth is not for all purposes territorial, this country may make police regulations with regard to it in order to regulate the fishings. The long use of this firth by our line fishermen goes to show the interest of the country to make such regulations. (The Queen v. Keyn, cit. per Cockburn, C. J., at pp. 188, 189, 214, 216, 218; Hall's Foreign Jurisdiction of the British Crown, pp. 243, 245.) Such regulation has been made in the past. (Herring Fishery Act, 1808, 48 Geo. III., cap. 110.) Parliament

has in other cases legislated for foreigners in extra-territorial waters. (56 Geo.III. cap. 23, §4 [Act for policing St. Helena when Napoleon was a prisoner]; Quarantine Act; 6 Geo. IV. cap. 78, §7, 8; Hardcastle on Statutory Law, p. 412, referring to M'Leod v. Attorney General for New South Wales, 1891, A. C. 455, at p. 458; Foreign Jurisdiction Act, 1890, 53 and 54 Vict. cap. 37, §14.)

The court answered both questions in the affirmative and dismissed the appeal.

The Lord Justice General: The facts of this case are that the appellant being a foreign subject, and master of a vessel registered in a foreign country, exercised the method of fishing known as otter trawling at a point within the Moray Firth, more than three miles from the shore, but to the west of a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire; that being thereafter found within British territory, to wit, at Grimsby, he was summoned to the sheriff court at Dornoch to answer to a complaint against him for having contravened the seventh section of the herring fishery act, 1889, and the bye-law of the fishery board, thereunder made, and was convicted.

It is not disputed that if the appellant had been a British subject in a British ship he would have been rightly convicted. Further, in the case of Peters v. Olsen, when the person convicted, as here, was a foreigner in a foreign ship, the conviction was held good. The only difference in the facts in that case was that the locus there, was upon a certain view of the evidence, within three miles of a line measured across the mouth of a bay, where the bay was not more than ten miles wide, which cannot be said here. But the conviction proceeded on no such consideration, but simply on the fact that the locus was within the limit expressly defined by the schedule of the sixth section of the herring fishery act; and the three learned judges in that case did, I think, undoubtedly consider and decide the question, whether the sixth section of the herring fishery act (which in this intention is the same as the seventh) was, or was not, intended to strike at foreigners as well as British subjects. But as this is a full bench, we are at liberty to reconsider that decision.

My lords, I apprehend that the question is one of construction and of construction only. In this court we have nothing to do with the question of whether the legislature has, or has not done, what foreign powers may consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an act of the legislature is *ultra vires* as in contravention of generally acknowledged principles of international law. For us an act of parliament duly passed by lords and commons and assented to by the king, is supreme, and we are bound to give effect to its

terms. The counsel for the appellant advanced the proposition that statutes creating offenses must be presumed to apply (1) to British subjects; and (2) to foreign subjects in British territory; but that short of express enactment their application should not be further extended. The appellant is admittedly not a British subject, which excludes (1); and he further argued that the *locus delicti*, being in the sea beyond the three-mile limit, was not within British territory; and that consequently the appellant was not included in the prohibition of the statute. Viewed as general propositions the two presumptions put forward by the appellant may be taken as correct. This, however, advances the matter but little, for like all presumptions they may be redargued, and the question remains whether they have been redargued on this occasion.

The first thing to be noted is that the prohibitions here, a breach of which constitutes the offence, is not an absolute prohibition against doing a certain thing, but a prohibition against doing it in a certain place. Now, when a legislature, using words of admitted generality—"It shall not be lawful," etc., "Every person who," etc.—conditions an offence by territorial limits, it creates, I think, a very strong inference that it is for the purposes specified, assuming a right to legislate for that territory against all persons whomsoever. This inference seems to me still further strengthened when it is obvious that the remedy to the mischief sought to be obtained by the prohibition would be either defeated or rendered less effective if all persons whomsoever were not affected by the enactment. It is obvious that the latter consideration applied in the present case. Whatever may be the views of any one as to the propriety or expediency of stopping trawling, the enactment shews on the face of it that it contemplates such stopping; and it would be most clearly ineffective to debar trawling by the British subject while the subjects of other nations were allowed so to fish.

It is said by the appellant that all this must give way to the consideration that international law has firmly fixed that a locus such as this is beyond the limits of territorial sovereignty; and that consequently it is not to be thought that in such a place the legislature could seek to affect any but the king's subjects.

It is a trite observation that there is no such thing as a standard of international law, extraneous to the domestic law of a kingdom, to which appeal may be made. International law, so far as this court is concerned is the body of doctrine regarding the international rights and duties of states which has been adopted and made part of the law of Scotland. Now can it be said to be clear by the law of Scotland that the locus here is beyond what the legislature may assert right to affect by legislation

against all whomsoever for the purpose of regulating methods of fishing?

I do not think I need say anything about what is known as the three-mile limit. It may be assumed that within the three miles the territorial sovereignty would be sufficient to cover any such legislation as the present. It is enough to say that that is not a proof of the counter proposition that outside the three miles no such result could be looked for. The locus, although outside the three-mile limit, is within the bay known as the Moray Firth, and the Moray Firth, says the respondent, is *intra fauces terræ*. Now, I cannot say that there is any definition of what *fauces terræ* exactly are. But there are at least three points which go far to shew that this spot might be considered as lying therein.

(1) The dicta of the Scottish institutional writers seem to show that it would be no usurpation, according to the law of Scotland, so to consider it.

Thus, Stair, II, i, 5:

> The vast ocean is common to all mankind as to navigation and fishing, which are the only uses thereof, because it is not capable of bounds; but when the sea is inclosed in bays, creeks, *or otherwise is capable of any bounds or meiths as within the points of such lands*, or within the view of such shores, then it may become proper, but with the reservation of passage for commerce as in the land.

And Bell, Pr. §639:

> The sovereign * * * is proprietor of the narrow seas within cannon shot of the land, and the *firths*, gulfs, and bays around the kingdom.

(2) The same statute puts forward claims to what are at least analogous places. If attention is paid to the schedule appended to §6, many places will be found far beyond the three-mile limit, *e.g.*, the Firth of Clyde near its mouth. I am not ignoring that it may be said that this in one sense is proving *idem per idem*, but none the less I do not think the fact can be ignored.

(3) There are many instances to be found in decided cases where the right of a nation to legislate for waters more or less landlocked or landembraced, although beyond the three-mile limit, has been admitted.

They will be found collected in the case of the Direct United States Cable Company v. Anglo-American Telegraph Company, L. R. 2 App. Cas. 394, the bay there in question being Conception Bay, which has a width at the mouth of rather more than twenty miles.

It seems to me, therefore, without laying down the proposition that the Moray Firth is for every purpose within the territorial sovereignty, it can at least be clearly said that the appellant cannot make out his pro-

position that it is inconceivable that the British legislature should attempt for fishery regulation to legislate against all and sundry in such a place. And if that is so, then I revert to the considerations already stated which as a matter of construction make me think that it did so legislate.

An argument was based on the terms of the North Sea convention—which had been concluded a few years before this act was passed, and which defines "exclusive fishery limits" in a manner which excludes this part of the Moray Firth. But I do not think any argument can be drawn from that definition, for the simple reason that the convention as a whole does not deal with the subject-matter here in question, viz: mode of fishing.

If it had been attempted to infer from the terms of the act a prohibition of which the effect was to give to subjects and deny to foreigners the right to fish, then the convention might be apt to suggest an argument against such a construction. But that is not so. Subjects and foreigners are *ex hypothesi* in this matter treated alike.

I am therefore of opinion that the conviction was right; that both questions should be answered in the affirmative, and that the appeal should be dismissed.

Lord Kyllachy: This appeal is directed against a conviction of the appellant—who is a foreigner—of having contravened a certain bye-law of the Scottish fishery board, made, it is not disputed, with the authority and in terms of a certain section of the herring fishery (Scotland) act of 1889.

The statute in question enacts (§7):

> The fishery board may by bye-law or bye-laws direct that the methods of fishing, known as beam trawling and otter trawling, shall not be used within a line drawn from Duncansby Head, in Caithness, to Rattray Head in Aberdeenshire, in any area or areas to be defined in said bye-law.

The bye-law in question (No. 10) enacts, *inter alia*, that the foregoing provision shall apply to the whole area specified in the statute. It also provides penalties for contraventions of the enactment.

It is not disputed that, if this statutory enactment falls, on its just construction, to be read literally and without qualification, the appellant was rightly convicted. This court is, of course, not entitled to canvass the power of the legislature to make the enactment. The only question open is as to its just construction. Nor can there be any doubt as to that construction if the language is to be read literally, or on ordinary principles of construction, and apart from implications sought to be deduced from outside.

The appellant, however, contends that the statute cannot be read literally, but must be read with refrence to certain alleged rules of international law; and that in that view it does not, on its just construction, apply, *as regards foreigners*, to such part of the area specified, as, according to international law, lies outside the territory or at least the territorial jurisdiction of the British crown. He further contends that the larger part of the area specified, including the part in which his alleged offence was committed, is, on the principles of international law, outside the said limits.

Now, dealing first with the point of construction—the question as to what the statutory enactment means—it may probably be conceded that there is always a certain presumption against the legislature of a country asserting or assuming the existence of a territorial jurisdiction going clearly beyond limits established by the common consent of nations—that is to say, by international law. Such assertion or assumption is, of course, not impossible. The legislature of a country is not *quoad hoc* quite in the same position as its courts of law exercising, or claiming to exercise, a jurisdiction *ex proprio motu*. A legislature may quite conceivably, by oversight or even design, exceed what an international tribunal (if such existed) might hold to be its international rights. Still, there is always a presumption against its intending to do so. I think that is acknowledged. But then it is only a presumption; and, as such, it must always give way to the language used if it is clear, and also to all counter presumptions which may legitimately be had in view in determining, on ordinary principles, the true meaning and intent of the legislation. Express words will, of course, be conclusive; and so also will plain implication.

Now it must, I think, be conceded that the language of the enactment here in question is fairly express—express, that is to say, to the effect of making an unlimited and unqualified prohibition, applying to the whole area specified, and affecting everybody—whether British subjects or foreigners. The primary enactment, it will be observed, is directed, not against persons or classes of persons. It is directed against certain things—the commission of certain acts—within a precisely defined area. It contains no elastic expressions—no indefinite terms. It declares simply, that within a precisely defined area a certain method of fishing known as beam or otter trawling shall not be practised. That is the primary enactment; and its scope is not, I think, affected by the association of ancillary provisions for the enforcement of the prohibition by penalties. *Prima facie*, therefore, it seems difficult to read such an enactment otherwise than as expressly providing that in no part of the

area mentioned shall the method of fishing in question be practised by anybody. Any other meaning can only be reached by the interpolation of words which are not used, and which, if interpolated, would materially alter the sense. And no case has yet occurred—certainly none has been cited—where the presumption on which the appellant founds had been held adequate to limit or qualify the terms of an enactment thus definite —expressed in quite definite language—and applied to a quite definite area.

The difficulty, however, of the appellant's construction—the difficulty, that is to say, of applying his presumption—is accentuated by several other considerations.

In the first place, the scheme and object of the enactment have to be considered. Plainly, that object was to protect the area—the whole area in question—as against a mode of fishing assumed to be injurious. And it need hardly be said that that object would not be attained, but would, on the contrary, be frustrated, by a construction of the enactment which, while it restrained British subjects from trawling within any part of the protected area, yet permitted foreigners to trawl as they pleased over the greater part of it. It is plain that under such conditions the mischief to be redressed would not be redressed, but might even be aggravated. Accordingly, it would be, I think, easier to suppose that the legislature had reached even an erroneous conclusion as to the extent of its jurisdiction, and had legislated accordingly, than that it had resolved deliberately to impose a futile restriction upon its own countrymen, and at the same time to create a hurtful monopoly in favour of foreigners. It would also, I think, be easier to accept almost any reasonable alternative, than to assume that the legislature contemplated a practically unworkable enactment—an enactment which would, in every prosecution under it, leave the issue to depend upon the result of an investigation by the local judge, of perhaps large and difficult questions of international law.

These are, it seems to me, at least serious difficulties in the way of reading into this statute and bye-law qualifying words which are not expressed. And other difficulties might, I think, be figured. But assuming all these to be overcome, one conclusive consideration I venture to think remains, viz: this, that the presumption on which the appellant founds has never, so far as known, been applied or proposed to be applied except where the excess of jurisdiction was clear. In other words, the whole ratio of the presumption fails if it appears that the area which is in controversy, is at best only in the position of debatable ground; being in fact within a category as to which different nations

have always taken more or less different views, and maintained different contentions.

This last observation, however, involves the consideration, not substantively, but as bearing on the point of construction, of the appellant's second proposition which, as I understand it, is really this—that outside of the line where the protected area—that is to say the Moray Firth narrows to a width of ten (or perhaps rather thirteen) miles—its whole waters are simply parts of the open sea—being so (1) according to established rules of international law, and (2) according to alleged special rules applicable, as it is said, to the Moray Firth, introduced by the North Sea convention of 1883, as scheduled to the sea fisheries act of that year. And if all this were made out, I acknowledge that on the point of construction the appellant would have a perhaps formidable case.

It, however, seems to me vain to suggest that according to international law there is *any part* of the Moray Firth which is simply an area of open sea, and thus in the same position as if it were situated, say, in the middle of the German Ocean. For *prima facie*, at least, the whole Firth, is, as its name bears, a "bay" or "estuary," formed by two well-marked headlands, and stretching inwards for many miles into the heart of the country. All that can be said *contra* is only this—that at its outer end the Firth is very wide, and is of a size, if not also of a configuration, somewhat beyond what is usually characteristic of bays and estuaries. That may or may not be so. The cases of the Bristol Channel, the Firth of Clyde, and the Firth of Forth, would have to be considered before that proposition could be affirmed. But, be that as it may, the real question I apprehend is—whether, by international law, there is any recognized and established rule on the subject, particularly a rule so arbitrary and artificial as that of the ten-mile measure, for which the appellant contends.

Now as to that, it is, I think, enough to say that no such rule exists, or (which is the same thing), that we have not had presented to us any evidence of its existence. But I may add that, if negative authority may be invoked, there seems to me to be no better authority as to the existing position, than the passage quoted at the discussion from Lord Blackburn's—or rather the Privy Council's—judgment in the Conception Bay Case (Direct United States Cable Co. v. Anglo-American Telegraph Co., L. R., 2 App. Cas. 420), in which, after reviewing existing authorities, their lordships sum up the result thus:

> It does not appear to their lordships that jurists and text-writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the state

possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination.

It seems difficult in face of this (the, I think, latest deliverance on the subject) to affirm that the statute and bye-law here in question are (if construed in their natural sense), in breach of plain and established rules of international law.

It remains, however, to consider as to the supposed bearing of the convention of 1883. And no doubt, if the question were one of *exclusive fishing privileges*, the convention might have an important bearing. For it defines, quite in terms of the appellant's contention, the extent to which, *inter alia*, in the Moray Firth, British subjects shall have the exclusive right of fishing. But exclusive fishing privileges—or, at all events, exclusive fishing privileges as defined by convention—are one thing. Territorial jurisdiction, proprietary or protective, is a different thing. And, as I read the convention of 1883, it is only with respect to exclusive fishing privileges that its terms and provisions have any relevancy. There is certainly nothing in the convention, at least nothing was brought under our notice, which in the least conflicts with the right of the several contracting nations to impose, each of them within its territorial limits (whatever these are), restrictions universally applicable against injurious practices or modes of fishing, such as are by this statute and bye-law imposed here. In other words, there is nothing in the statute and bye-law in question which at all interferes with the exclusive fishing privileges of the several nations. I cannot assent to the argument, that the convention really introduces a new chapter into general international law—a chapter establishing, with respect to the definition of bays and estuaries, or at all events bays and estuaries off the North Sea, new and artificial rules. That appears to me to be a somewhat extreme proposition. I may add that I have not found it necessary to consider the effect of the appellant's vessel belonging to Norway—a country which was not a party to the convention, and had probably good reasons for not being so. I assume, for the purposes of our judgment, that the appellant is in no worse position than if he had been the master of a German or Danish fishing vessel.

The result on the whole, therefore, is that without deciding substantively whether or not the whole area of the Moray Firth would or should be recognised by an international tribunal (if such existed), as within the jurisdiction of the British crown, I am prepared to consider myself bound to hold—what is sufficient to support this conviction—that upon its just construction the act of 1889 asserts the existence, for the pro-

tective purposes to which it relates, of the jurisdiction in question—and that that is enough for us sitting here as one of his majesty's courts.

Lord Johnston: The offence charged is created by the herring fishery (Scotland) act, 1889, §7, which empowers the fishery board by bye-law to direct that beam trawling shall not be used in the Moray Firth within a line drawn from Duncansby Head to Rattray Point, and imposes penalties, superseded by those of the act 1895, §10 (4) and (5), on any person contravening such bye-law.

The enactment is not operative till the fishery board speaks by its bye-law. This it did in 1892.

The question raised by this appeal is, did the legislature intend the above enactment to be of universal application, or to be confined in its prohibition and its penalties to British fishermen? The language is absolute and general. But notwithstanding this absoluteness and generality, it would, I think, have been necessary to determine some of the larger questions of international law with which Lord Kyllachy has dealt, were it not for the following considerations, viz: first, that the enactment and its relative bye-law are no assertion of exclusive rightof fishing, but only of right of regulation of fisheries. But, second, and more particularly, that the course of Scottish fishery legislation leads to a conclusion which precludes those wider questions above referred to.

I find that parliament, before the union and since, has been in use to provide for the regulation of fisheries round the coasts of Scotland, without confining itself to territorial waters in the narrower significance.

For instance, before the union, the act of Anne, 1705, cap. 48, was passed for the advancement and establishment of the fishing trade in and about the kingdom, and authorised her majesty's subjects to take herring and white fish in all and sundry seas, channels, bays, etc., of this kingdom, "wheresoever herring or white fish may be taken," and then proceeds to protect and regulate their trade.

The treaty of union itself, §15, provided for the application of a portion of the "equivalent" to encouraging and promoting the fisheries of Scotland. This grant permitted the first establishment in 1727, by 13 Geo. I. cap. 30, of the board of commissioners, which, after various changes in its constitution, was in 1883 superseded by the present fishery board.

A survey of the acts between 1727 and 1882, and they are numerous, discloses that the functions of these commissioners and their officers were not confined to inshore or strictly territorial waters. And it is consistent with the prior history of the matter, that in 1882, by the Act 45 and 46 Vict. cap. 78, §5, the present fishery board, having had con-

ferred on them the whole powers and duties of the former board of British white herring fishery, are directed to "take cognisance of everything relating to the coast and deep sea fisheries of Scotland," and to "take such measures for their improvement" as the funds under their administration may admit of.

When I read the enactment under consideration in the light of previous legislation, I have no doubt that the legislature intended it to be of general application. I, therefore, agree in the conclusion at which your lordships have arrived.

Lord Salvesen: The facts of this case have been already fully narrated. I note, however, that the appellant does not found on his nationality as a Dane. The preliminary objection which he stated to the jurisdiction of Dornoch sheriff court, was on the footing that he was the foreign master of a steam trawler registered in Norway; and his counsel admitted that his case falls to be treated as if his own nationality had been the same as that of the ship he commanded.

It was conceded for the crown, and I think rightly, that if an offence is created by a statute of the British parliament, it will, in the ordinary case, be presumed to have no application beyond territorial waters. But as this presumption must yield to an express clause, that the act shall apply to foreigners and British subjects alike; so I think it will yield to a clear implication to the like effect. Where a British statute prohibits a certain thing to be done within a definite geographical area, it seems to me that there is no presumption that such a prohibition shall be confined only to British subjects. Still more, if, on examining the subject-matter of the prohibition, it is found that it will be futile or ineffectual unless its operation is general, then I think its generality is not capable of any limitation in favour of persons who do not ordinarily owe obedience to the British parliament. These considerations are applicable to the present case. The statutes and bye-laws contravened have, for their objects, the protection of line fishermen, and the preservation of the spawning beds of fish in the interests or supposed interests of the whole fishing community. If they were to be construed as impliedly excepting from their scope all foreigners fishing from foreign vessels, such a construction would not merely defeat the object of the legislature, but would confer a privilege upon foreigners which was denied to British subjects. It can scarcely be supposed that a British parliament should pass legislation which would neither have the effect of protecting line fishermen from the competition of trawlers, nor of preserving the spawning beds, but would simply place British subjects under a disability which did not extend to foreigners—in other words, create in favour of

foreigners a monopoly of trawl fishing in the Moray Firth. I think it was a just observation of the solicitor general that, if legislation of this nature had been proposed, and the words inserted which the dean of faculty maintained were implied, it would never have been submitted by a responsible minister, or have received the approval of parliament.

The view which I have expressed is strengthened by a consideration of the area within which the operation of the bye-law is confined. The stretch of water known as the Moray Firth, and defined by the bye-law, is undoubtedly geographically *inter fauces terræ*; and there are many examples of states asserting exclusive jurisdiction within such areas, and of such assertion being acquiesced in by other nations. In these circumstances I think the act, under the authority of which the bye-law in question was passed, must be treated as an assertion by the British parliament of their right to regulate the fishing in this area, and to treat it as within the territory over which the jurisdiction of the Scottish courts extends. The right so claimed may or may not be conceded by other powers, but that is a matter with which this court has no concern. We were told that the result of upholding the conviction would be to provoke reprisals by other powers. If so, that is a matter for the foreign office. But it is difficult to suppose that foreign nations should object to a regulation designed for the protection of fisheries in which they all share, and which confers no exclusive privileges on British subjects.

Perhaps the strongest point urged by the appellant was that based upon the sea fisheries convention of 1883, where the exclusive privileges of the fishermen-subjects of the high contracting parties were geographically defined; and it was said that it can never be assumed that parliament would legislate in violation of a treaty with foreign powers. If it were clear that the act of 1889, as now construed, is in direct violation of the convention, the argument would be of the greatest weight. But I find no sufficient reason for holding that a regulation which confers no exclusive fishing rights on British subjects is inconsistent with the convention. Moreover, in my opinion, the appellant cannot found upon the convention as conferring upon him any treaty rights. It was said that the convention might nevertheless be treated as evidence, and it was even contended as conclusive evidence of the limits of the claim over territorial waters which this country maintains. I do not think so. I see no reason why, even if Great Britain's territorial rights were limited, as by contract in a question with certain powers, she should not assert, as against Norway, rights of a much more extensive nature. On these grounds I have come to the conclusion that the sheriff court of Dornoch

had jurisdiction to try the offence charged, and that the conviction must therefore stand.

The Lord Justice-Clerk, Lord M'Laren, Lord Stormonth-Darling, Lord Low, Lord Pearson, Lord Ardwall, Lord Dundas and Lord Mackenzie concurred. Nineteenth July, 1906.

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